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in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

JEROME J. BERGER,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Appendix contained herein)

The Petitioner Jerome J. Berger respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 10, 1972.

OPINION BELOW

The opinion of the District Court of the Southern District of Florida and the opinion of the Court of Appeals and its denial of the petition for rehearing and Mandate are appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 10, 1972. A timely petition for rehearing was denied on March 7, 1972, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under Rule 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

WHETHER A COURT OF APPEALS MAY, IN CONFLICT WITH ANOTHER COURT OF APPEALS, SET ASIDE A FINDING OF FACT OF THE DISTRICT COURT THAT ONE CORPORATION WAS THE INSTRUMENTALITY OR ALTER-EGO OF ANOTHER CORPORATION WITHOUT APPLYING THE CLEARLY ERRONEOUS RULE SET FORTH IN FEDERAL RULES OF CIVIL PROCEDURE 52(a)?

II

WHETHER A UNITED STATES COURT OF APPEALS SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE THE SUPERVISION OF THIS COURT WHEN IN REVERSING A JUDGMENT ENTERED ON ONE OF TWO ALTERNATE COUNTS IT PROHIBITS FURTHER PROCEEDINGS IN THE TRIAL COURT ON THE OTHER COUNT WHICH HAS NEVER BEEN DETERMINED ON THE MERITS, THEREBY DEPRIVING PLAINTIFF OF HIS DAY IN COURT ON THAT COUNT?

STATEMENT OF THE CASE

Berger sued CBS, Inc. ("CBS") for appropriating his television show. Jurisdiction was based on diversity of citizenship. He pleaded alternatively. In Count I he charged CBS with breaching an implied contract with him. In Count II he charged that although CBS Films, Inc. was a separate corporation, it was so united in interest with CBS, that CBS should be held liable for breaching the implied covenant of good faith in the express contract of plaintiff with CBS Films, Inc.

The Court held that CBS had appropriated Berger's show and awarded Berger $222,750.00, plus $36,007.28 interest on Count II, finding that CBS Films was a mere department of CBS and that, therefore, CBS could be held liable for breaching the implied covenant of good faith in the Berger-CBS Films contract.

The Trial Court thereupon dismissed the implied contract count, correctly stating that Berger could not recover on both theories and "[b]ecause of the findings . . . [with] . . . regard to the express contract, there is no need to discuss the issues raised by plaintiff's allegations of implied-in-fact contract." (A. 1, 29)

CBS appealed and the Court of Appeals reversed the Judge's ruling on Count II, holding that Berger had failed to prove CBS Films to be the instrumentality of CBS (A. 24), because "Just as siamesing is a biological fact, so must corporate umbilication be anatomically demonstrated." (A. 20) In reversing the Trial Court's finding of fact that CBS Films was a mere department of CBS, the Court did not apply the clearly erroneous rule of the Federal Rules of Civil Procedure. (F.R.C.P. 52(a))

Berger filed a timely petition for rehearing requesting that the case be remanded for findings on the alternate count (implied contract between Berger and CBS), which had never been ruled upon by the Trial Court, but the Court of Appeals refused to do so without saying why and ordered the District Court to enter a judgment on that count as well. (Mandate, A. 26)

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE APPLICABILITY OF F.R.C.P. 52(a).

Federal Rule of Civil Procedure 52(a) provides that ". . . Findings of fact shall not be set aside unless clearly erroneous. . . ."

After considering all the evidence on the question of whether CBS Films was a mere department or division of CBS, the Trial Court made a finding of fact that indeed it was; and that, therefore, the corporate veil could be pierced and CBS was in reality a party to the Berger-CBS Films contract. The Fifth Circuit overturned this finding and resultantly reversed the Judge's holding that CBS breached the covenant of good faith in its express contract with Berger.

In overturning the finding, however, the Court did not make a determination that the Judge's finding was clearly erroneous. Federal Rule 52(a) required the Court of Appeals to make this determination.

The Eighth Circuit has held that the precise question of when one corporation is an instrumentality of another corporation is a factual issue and that to overturn a District Court's finding on this question the Court of Appeals must apply the clearly erroneous rule. *National Bond*

Finance Co. v. General Motors Corp., 8 Cir. 1965, 341 F.2d 1022. The decision of the Eighth Circuit cannot be reconciled with the decision below.

The record shows quite clearly, and the Trial Judge found, that CBS Films was a mere department or division of CBS. The refusal of the Fifth Circuit to respect those facts and that finding and the action of the Court in reviewing the record *de novo* and in making its own findings as to corporate identity without applying the clearly erroneous rule cannot be justified.

The conflict with the Eighth Circuit and the failure to follow the mandate of the Federal Rules of Civil Procedure justify the grant of certiorari to review the judgment below.

II

A UNITED STATES COURT OF APPEALS SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE THE SUPERVISION OF THIS COURT WHEN IN REVERSING A JUDGMENT ENTERED ON ONE OF TWO ALTERNATE COUNTS IT PROHIBITS FURTHER PROCEEDINGS IN THE TRIAL COURT ON THE OTHER COUNT WHICH HAS NEVER BEEN DETERMINED ON THE MERITS, THEREBY DEPRIVING THE PLAINTIFF OF HIS DAY IN COURT ON THAT COUNT.

Although Berger charged CBS with breaching an implied contract, no court has ever determined whether there was an implied contract between Berger and CBS. The Trial Court dismissed the implied contract count without findings of fact or conclusions of law solely because Berger recovered on his express contract count and, therefore, could not recover on his alternate count. (A. 1, 2[illegible]) The Court of Appeals reversed the Judge's finding that there was an express contract between Berger and CBS which removed the sole reason why the Trial Court had not permitted plaintiff to recover on his implied contract. Despite this, the Appellate Court without opinion or explanation precluded plaintiff from asking the Trial Court for findings and conclusions on his alternate count. Thus, Berger has been judicially foreclosed from ever having a court determine whether he and CBS had an implied contract.

The record below would support a finding that plaintiff has an implied contract with CBS (in fact, the Trial Court denied CBS' motion for a directed verdict on the implied contract count. (A. 27)

The unexplained action of the Court of Appeals in preventing the plaintiff from proceeding on the implied contract count clearly violates the letter and spirit of Federal Rule of Civil Procedure 8(e).

The plain words of the rule provide that dismissal of the express contract count for lack of merit does not also justify dismissal of the implied contract count. Certainly, proceeding to judgment on the express contract could not, consistent with Rule 8(e)(2), work any election which would prohibit proceeding on the implied contract count once the judgment was reversed. Rule 8(e) of the Federal Rules of Civil Procedure invests a plaintiff with the right to set forth two or more statements of a claim alternately or hypothetically regardless of consistency. As Professor Moore puts it:

> [W]here plaintiff seeks to recover on a contract or, *failing that*, to recover in *quantum meriut*, instead of pleading the transaction alternatively or hypothetically in one count, he may simply plead two separate counts, one on the contract and the other in *quantum meriut*, as though he had two entirely separate and distinct claims. Rule 8(e)(2) makes it clear that this is permissible and that any inconsistency between the two claims does not render the pleading defective. The inconsistency may lie either in the statement of the facts or in the legal theories adopted, *and the*

> *party will not be required to elect upon which legal theory he will proceed, since this would defeat the whole purpose of allowing inconsistent pleading.* 2 A *Moore's Federal Practice*, ¶8.32 pp. 1889-1890 [emphasis ours]

Furthermore, no election of theories is *ever* necessary. The right to plead inconsistent causes of action and to seek relief in the alternative is not limited to the trial in District Courts "but obtains until final disposition of the cause on appeal." *Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co.*, 10 Cir. 1948, 168 F.2d 381, *cert. den.*, 335 U.S. 859, 69 S.Ct. 132, 92 L.Ed. 406.

There was simply no justification for the refusal of the Appellate Court to remand this case for proceedings on the alternate implied contract count once the Court reversed and rendered a judgment against the plaintiff on the express contract count. The Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervision. No plaintiff under our modern rules of pleading should be sent away from the courthouse without determination on the merits of every issue he came to litigate. This plaintiff who came to the courthouse alleging a cause of action for implied contract has never had his day in court on that issue. This Court should order a remand to the Trial Court for findings of fact and conclusions of law on the implied contract count, if the judgment on the express count is to stand reversed.

CONCLUSION

This case presents issues on which the lower federal courts need guidance. The Court of Appeals has rendered an opinion in conflict with another circuit on a very important procedural issue which frequently recurs and is likely to come up even more frequently as the reality of conglomerate integration further pervades the economy. The Court of Appeals has clearly refused to view the question of corporate identity as a factual question requiring it to find that the District Court was clearly erroneous before overturning the finding on that question. The Eighth Circuit follows the opposite rule, and properly so.

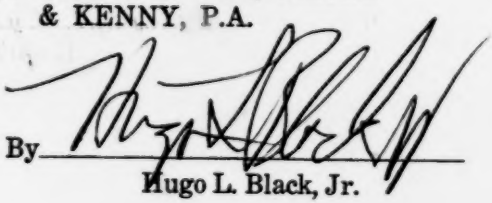
The issue of what happens in the federal system to an alternative count rendered moot on the merits by judgment on another count when the judgment is reversed is one of vast potential importance to all federal courts and litigants. Pleading in the alternative is the rule rather than the exception in the federal courts today. Rule 52 renders it necessary for the Trial Judge in his findings to select from alternate theories such as breach of express contract and breach of implied contract, even when the facts would support either. Whenever a reversal occurs, the very problem presented by this case will recur. Does the Appellate Court send it back for findings on the alternate count when the reversal has transformed it from a moot to a live issue or simply send the litigant away without his day in court on that issue? Every case where a plaintiff is denied his day in court is one of crisis to the judicial system because it is so foreign to the promise of Anglo-American law.

This Court should grant this petition and instruct the Fifth Circuit to determine whether the Trial Judge's find-

ings on Count II were clearly erroneous. It is nice to know that "siamesing is a biological fact" and that "corporate umbilication must be anatomically demonstrated." But, under the law, the Trial Judge's finding that CBS Films is the alter-ego of CBS should have been permitted to stand regardless of what kind of process siamesing is and what it takes to demonstrate corporate umbilication—unless the Appellate Court is willing to pronounce that the Trial Court's finding is clearly erroneous. In the event the Court of Appeals cannot make that pronouncement, then this Court should instruct the Court of Appeals to affirm the Trial Court. If, however, the Court of Appeals is willing to hold that the Trial Court's findings on corporate identity are clearly erroneous, then the Appellate Court should be instructed to remand the case to the District Court for findings of fact and conclusions of law on Count I, the implied contract count.

Respectfully submitted,

KELLY, BLACK, BLACK
& KENNY, P.A.

By 
Hugo L. Black, Jr.

Of Counsel: Thomas H. Seymour
William G. Earle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit were furnished on the 2nd day of June, 1972 to the following:

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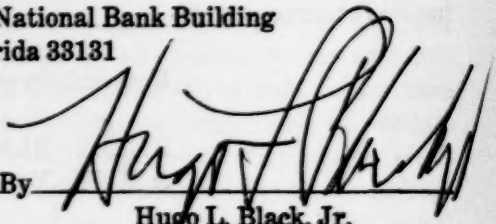

By
Hugo L. Black, Jr.

APPENDIX

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 68-9-CIV.-CF

JEROME J. BERGER,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM,

Defendant.

[Filed Dec. 21, 1970]

OPINION

Jurisdiction of this action for damages for breach of contract, express and implied-in-fact, and for privacy of literary property[1] is predicated on diversity of citizenship.[2]

At the outset, it must be said that most, if not all, of plaintiff's dealings were not with Columbia Broadcasting System, Inc., but with a wholly-owned subsidiary, CBS

[1]Because of the findings to be made in regard to the express contract, there is no need to discuss the issues raised by plaintiff's allegations of implied-in-fact contract.

[2]The parties agree that this suit is to be governed by the substantive internal law of the State of New York.

Films, Inc. Under the circumstances here present, however, CBS Films, Inc., is an alter ego of the Columbia Broadcasting System. When a wholly-owned subsidiary corporation is operated as a department or branch or division of the parent corporation, the courts will disregard the corporate identity of the subsidiary and treat the two corporations as one. 1 Fletcher on Corporations 216. Moreover, when a parent operates the properties of its wholly-owned subsidiary directly and immediately and utterly disregards the subsidiary as a distinct corporate entity, except for bookkeeping purposes, the courts will similarly treat the two as one entity. Kingston Dry Dock v. Lake Champlain Transp. Co., 31 F.2d 265 (2nd Cir. 1929); Costan v. Manilla Electric Co., 24 F.2d 383 (2nd Cir. 1928). At all times material, the Board of Directors of CBS Films, Inc., has consisted of employees of Columbia Broadcasting System, Inc., acting within the line and scope of their authority. CBS Films, Inc., has thus acted as a division of Columbia Broadcasting System, Inc. The organization chart for Columbia Broadcasting System, Inc., includes CBS Films, Inc. All lines of employee authority from CBS Films, Inc., pass through employees of Columbia Broadcasting System, Inc., and other subsidiaries to the Chairman of the Board of Columbia Broadcasting System, Inc. The corporations are one and the same.[3]

On April 1, 1965, the plaintiff, Jerome J. Berger, produced in Las Vegas, Nevada, a fashion spectacular entitled "International Fashion Festival" which climaxed with selection of "The Model of the Year." Sam Cooke Digges, then Administrative Vice President of CBS, went to Las Vegas prior to April 1 with his wife, professionally

[3]Hereinafter, both will be referred to as CBS.

known as "Carol Knox," who participated in the "International Fashion Festival" as fashion commentator. After his arrival in Las Vegas, Mr. Digges telephoned Michael Dann, then head of network programming for CBS, and informed Dann that he had come upon a program — the International Fashion Festival — that he believed had possibilities for network broadcast, live and in color. Mr. Dann then dispatched Paul Levitan, the Director of Special Events of Columbia Broadcasting System, Inc., to Las Vegas to scout the International Fashion Festival for possible network broadcast, live and in color. Mr. Levitan as a part of his duties for CBS then proceeded to Las Vegas to scout the International Fashion Festival. Mr. Levitan and Mr. Digges watched the show together. Essentially, the show they watched consisted of a premiere display by the world's top haute coutures in one show of their latest fashion creations for ladies and a contest among the models, climaxed by selection of "The Model of the Year." Plaintiff, for the purpose of constructing a pilot film for use in selling the show for television network broadcast live and in color, caused wild film footage to be made of the show in black-and-white under poor technical conditions. After watching the live show, both Levitan and Digges believed that the show had definite possibilities for future network broadcast, live and in color. Levitan instructed the plaintiff to prepare written materials for the coming 1966 show and to bring the materials to Levitan in New York City. Digges instructed the plaintiff to process the wild film and to contact Digges in New York about distribution of the show.

On or about April 30, 1965, the plaintiff and CBS entered into a written license contract pursuant to which CBS acquired from plaintiff the right to distribute the

product of the wild film footage of the 1965 show and a right of first refusal of the exclusive right to license the television broadcast of plaintiff's show tentatively entitled "International Fashion Festival" or similar type fashion show during each of the nine (9) calendar years commencing 1966 through 1974. Pursuant to this contract, CBS paid plaintiff $5,000.00, and plaintiff assembled the wild footage and other material into a pilot film of International Fashion Festival, it being understood that the film was of low technical quality and represented a rough draft only of the potential of the International Fashion Festival for network broadcast live and in color. The head of daytime programming of CBS viewed the film and expressed the opinion that the show would make a meritorious offering as a nighttime network special event broadcast live and in color. CBS later offered the film for sale.

Plaintiff, meanwhile, busied himself with arrangements for the coming 1966 International Fashion Festival, among other things securing the Miami Beach Auditorium, engaging the services of public relations people, engaging the services of a writer, and attempting to obtain sponsors through New York advertising agencies for network broadcast of the 1966 International Fashion Festival live and in color. CBS knew of the plans for the 1966 international Fashion Festival and had no reason to believe that the plaintiff could not carry them out successfully. Pursuant to the aforementioned contract, representatives of CBS had commenced contracts with advertising agencies in New York themselves for the purpose of securing sponsors for network broadcast live and in color of the coming 1966 International Fashion Festival. Among other things, the pilot film was used as a sales aid by CBS and the plaintiff's representatives.

Meanwhile, on or about August 12, 1965, only four months and twelve days after he scouted the International Fashion Festival in Las Vegas and only three months and twelve days after CBS contracted with plaintiff for first refusal rights to future International Fashion Festivals, Paul Levitan discussed with one Stewart Cowley and his attorney the production of a fashion spectacular of a type similar to International Fashion Festival which, like International Fashion Festival, would include a beauty pageant in which the Model of the Year would be selected. Stewart Cowley operated a model agency in New York City. Immediately after this August 12, 1965, meeting, Paul Levitan ordered the Legal Department of CBS to check on the title "Fashion Model of the Year" for a "fashion spectacular"; and Cowley wrote and mailed to himself a registered letter in which he described the essence of his "idea" as a "Fashion Show for Charity X." In order to proceed with the project, Mr. Cowley, who had no significant contacts with the fashion world, employed Mrs. Helene Obolensky, the former fashion editor of Redbook magazine, to arrange the fashion segment of the show. Prior to this time, Mrs. Obolensky had been in contact with the plaintiff concerning participation in production of International Fashion Festival. Mrs. Obolensky was instructed by Mr. Cowley to prepare the format for a fashion spectacular and did so. CBS, on or about August 12, 1965, commenced to negotiate the details of a contract with Cowley, noting and suggesting in internal, written memoranda that CBS was "putting Cowley into business"; that exchange of certain papers was necessary "to start up the idea." In addition, one CBS memorandum says: "Fashion Model of the Year — set up organization." CBS even suggested possible sponsors to Cowley, including Clairol, a business organization whom other representatives of CBS were

supposedly soliciting for International Fashion Festival. From late 1965 to the middle of 1966, Cowley, his attorney, and Mrs. Obolensky under the aegis of CBS went to advertising agencies in New York with their show in an attempt to obtain sponsors. During this same period, plaintiff and his representatives were at the same advertising agencies attempting to obtain sponsorship for network broadcast live and in color of the 1966 International Fashion Festival. Representatives of advertising agencies commented on the similarities of International Fashion Festival and the Cowley show sufficiently that the plaintiff and Mrs. Obolensky had a meeting at which joining forces was discussed by Mrs. Obolensky, but nothing was determined. As a result of the transfer of CBS's favor from International Fashion Festival to Cowley's show, the New York City advertising agencies lost interest in International Fashion Festival.

In approximately June of 1966, at a time when the plaintiff and Cowley were in the advertising agencies with their shows and at a time when plaintiff was submitting fresh treatments and scripts of his show to CBS, CBS let it be known to the advertising agencies that it had abandoned the idea of televising the Cowley show for the calendar year of 1966, and told the plaintiff in bad faith it had no interest in International Fashion Festival without drastic changes. In truth and in fact, CBS retained its interest in International Fashion Festival and similar type fashion shows. In the Fall of 1966, negotiations between CBS and Cowley resumed and culminated in a contract pursuant to which CBS acquired from Cowley rights to a similar type fashion show to International Fashion Festival for network broadcast live and in color in 1967, and a right of first refusal to any such shows pro-

duced in the years 1968 through 1977. Armed with this contract, Cowley, who theretofore had been unable to obtain sponsorship at the advertising agencies for his show, picked up sponsors. Pursuant to the contract between Cowley and CBS, Paul Levitan produced for CBS a show called "Model of the Year" in the calendar years of 1967 and 1968 for network broadcast live and in color by CBS. The shows were in all material respects similar type fashion shows to International Fashion Festival. Immediately prior to the first broadcast, plaintiff through the show business daily newspaper Variety learned for the first time of CBS's plans for the Cowley show and warned CBS that it appeared that CBS planned to broadcast a show materially similar to the "International Fashion Festival." CBS, nevertheless, went ahead with the broadcast.

Every written contract carries an implied covenant that the parties will deal with each other fairly and in good faith and that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. Guardino Tank Processing Corp. v. Olsson, 89 N.Y.S.2d 691 (Sup.Ct. 1949); Tillett v. Deering, Millike & Co., 88 N.Y.S.2d 148 (Sup.Ct. 1948); Queen for a Day v. American Broadcasting Co., No. 33797 (Cal. Ct. App. 1970); 17 A.Jur.2d 653, "Contracts," § 328, 17A Corpus Juris Secundum 286, "Contracts," § 328. To put it differently, it is an implied condition of very contract that one party will not prevent performance by the other party, and it follows that a contracting party who prevents the other from performing under the contract cannot urge or avail himself of the nonperformance which he himself has brought about. 17 Am. Jur. 881, "Contracts," § 426. Absence of fair dealing on the part of CBS is pre-

cisely the finding which is made and which is the key to plaintiff's recovery. Although CBS since the August 12, 1965, meeting between Paul Levitan and Stewart Cowley has continuously professed its intention to abide by its contract with plaintiff and has proclaimed plaintiff's ownership of the International Fashion Festival, CBS has, in fact, continuously and intentionally subverted the right of plaintiff to exploit his creation. While the left hand of CBS had contractually bound it to develop plaintiff's show, the right hand was negotiating with Cowley with respect to another fashion spectacular virtually identical in intent and content.

CBS contends, however, that plaintiff and not CBS defaulted on the agreement, pointing to the fact that plaintiff has produced no International Fashion Festivals in any calendar years beginning in 1966 to date. But plaintiff was not so obligated to activate the contractual duties which CBS has violated under the circumstances of this case. CBS believed and was on notice that the 1966 International Fashion Festival would be produced when it first commenced to assist Cowley with his show in violation of the covenant of good faith and fair dealing in the plaintiff's contract with CBS. Sometime about August 12, 1965, CBS simply determined to jettison the plaintiff and to take on Cowley without regard to whether or not the plaintiff ever actually produced International Fashion Festival again.

The measure of damages for breach of an agreement under which the parties are to share profits is the amount of profits which the plaintiff would have received under the contract if it had been carried out. 25 C.J.S. 879. CBS's profits from the 1967 Cowley show was $55,000.00; from

the 1968 show $126,000.00. CBS, in calculating its profits for this show, included rights fees which would not have been incurred had CBS produced the 1967 and 1968 shows through plaintiff and the salary of Levitan which is not properly attributable to the cost of the shows. The sum of $35,000.00 which is the amount of the 1967 rights fees and the sum of $8,000.00 which is the amount of Levitan's salary attributed to the 1967 show are due to be added to CBS's profit figures to get the true net profits on the 1967 show and the sum of $65,000.00 which is the amount of the 1968 rights fees and the sum of $8,000.00 which is the amount of Levitan's salary attributed to the 1968 show are due to be added to CBS's profit figures in order to get the true net profits of CBS on the 1968 show. For the year 1967, then, the true net profits of CBS on the show were $98,000.00; for 1968 the true net profits were $199,000.00. CBS's true net profits for 1967 and 1968 combined were $297,000.00. All of these calculations are, of course, before taxes.

The contract between CBS and plaintiff is still in full force and effect, will remain in full force and effect until the end of the calendar year 1974, unless terminated by mutual consent of the parties prior to that time. Each year under said contract stands on its own feet insofar as breach is concerned. CBS to date has breached the covenant of good faith and fair dealing in each of the calendar years 1966, 1967, 1968 and 1969.

As a proximate result of CBS's breaches of the covenant of good faith and fair dealing in the years of 1967 and 1968 by network broadcasting live and in color of the Cowley show, the plaintiff was damaged in an amount equal at least to 75% of CBS's true profits, as set forth

above. This is the amount CBS was obliged to pay for the use it made of the 1965 International Fashion Festival. That amount for 1967 is $73,500.00. Interest at the rate of 6% per annum is due on this amount from August 30, 1967 (the date of the broadcast of the first Cowley show) to date of judgment. That amount for 1968 is $149,250.00. Interest at the rate of 6% is due on this amount from September 14 ,1968 (the date of the broadcast of the second Cowley show) to the date of judgment. The breaches of the covenant of good faith and fair dealing in the calendar years of 1966 and 1969 are injuria absque domno as no International Fashion Festival or similar type fashion show was broadcast in those years. Plaintiff did not present any credible evidence with respect to actual damages in the calendar years in which the show was not broadcast. Plaintiff is not entitled to recover for the development costs of International Fashion Festival because, in the first place, plaintiff did not present sufficient credible evidence of those costs with enough specificity to provide the court with a solid guide; and in the second place, the costs presumptively would be recovered in the license fees.

Therefore, plaintiff shall have judgment against defendant in the amount stated above, plus interest from August 30, 1967, and costs, on count II of his complaint. A party cannot recover on an express contract and an implied contract, whether in fact or in law, on the same set of facts. Since plaintiff is entitled to recovery for breaches of implied covenants of good faith and fair dealing in his express contract with CBS, he may not have recovery on any theory of implied contract. For that reason, count I of the complaint shall be dismissed.

This Opinion constitutes this court's findings of fact and conclusions of law. The clerk of this court is directed to file this Opinion and send true copies to counsel of record. Counsel for plaintiff is directed to prepare a final judgment consistent with the views expressed in this Opinion within thirty (30) days after the entry hereof and submit the same to the court after having first obtained approval as to form from counsel for defendant.

DONE at Houston, Texas, this ____ day of December, 1970.

/s/ signature illegible

United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

JEROME J. BERGER,
Plaintiff-Appellee,

versus

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(January 10, 1972)

Before TUTTLE, GEWIN, and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: In this diversity litigation we are confronted with an alleged breach of contract involving the syndication of a fashion spectacular entitled International Fashion Festival. We have examined the record of this long and protracted trial with the attendant findings and conclusions of a distinguished trial judge. The volumes present a play with numerous actors and many scenes. However, we find it unnecessary to review

all of the legal issues raised by this pageant, for we conclude that the trial court should have realized at the end of the prologue that the curtain should have fallen on plaintiff's litigious drama.

Our story begins in Las Vegas, one of the show business capitals of the nation. There, in the spring of 1965, the plaintiff, Jerome J. Berger, was preparing to produce his International Fashion Festival, a show consisting primarily of a display of haute couture fashions of international designers, climaxed by the selection of a "Model of the Year" from among the designers' house models. To serve as fashion commentator for his show, plaintiff secured the services of a Miss Carol Knox, whose husband, Sam Cook Digges, was then Administrative Vice President of CBS Films, Inc., [hereinafter referred to as Films], a wholly-owned subsidiary of defendant, Columbia Broadcasting System, Inc. Sam Digges' primary responsibility in his executive position at Films was to secure distribution rights to filmed products so that the company could then syndicate such products on a national or market-by-market basis. Having become interested in the International Fashion Festival as a potential distribution property for Films, Digges informed one of the vice presidents of CBS, Inc. of plaintiff's proposed production and its possibilities for network broadcasting. CBS, Inc. then dispatched to Las Vegas Mr. Paul Levitan, director of Special Events for CBS, Inc., to scout the International Fashion Festival. Mr. Levitan and Mr. Digges, accompanied by other representatives of Films, viewed the live production of the plaintiff's show on April 1, 1965, and commented to the plaintiff that the show had definite possibilities for future network broadcasting. For the purpose of constructing a pilot film for use in selling his

show, plaintiff caused wild film footage to be made of the live production. He then traveled to New York and displayed his wild film footage to representatives of Films. Thereafter, on April 30, 1965, the plaintiff and Films entered into a written licensing agreement whereby Films acquired the right to distribute the product of the wild film footage of the plaintiff's 1965 show and an exclusive right of first refusal to license the television broadcast of plaintiff's International Fashion Festival or similar type fashion show during each of the nine calendar years from 1966 through 1974. Pursuant to this contract, Films advanced the plaintiff $5,000 for expenses, and the plaintiff assembled his wild footage and other material into a pilot film of the International Fashion Festival. This film was of poor technical quality and was intended to represent only a rough draft of the potential of the show for network broadcasting.

In the late summer of 1965, while plaintiff was busying himself with arrangements for his scheduled 1966 International Fashion Festival, Mr. Stewart Cowley, operator of a model agency in New York City, approached Paul Levitan at CBS, Inc. and inquired about the possibility of producing a fashion spectacular similar to plaintiff's International Fashion Festival. Paul Levitan assisted in developing Cowley's idea, and in the fall of 1966 negotiations between Cowley and CBS, Inc. culminated in a contract pursuant to which CBS, Inc. acquired broadcasting rights to Cowley's fashion show and an exclusive right of first refusal to any similar shows produced from 1968 through 1977. Armed with this contract, Cowley obtained sponsorship for his show, which was entitled "Model of the Year" and which was similar in all material respects to the plaintiff's International Fashion Festival. Immedi-

ately prior to the 1967 broadcast of Cowley's "Model of the Year" show, plaintiff learned for the first time of the plans of CBS, Inc., and warned the company that Cowley's show was materially similar to his own International Fashion Festival. CBS, Inc., nevertheless, proceeded with its production plans and broadcast the "Model of the Year" show in both 1967 and 1968.[1]

Thereafter, in January of 1968, Berger instituted this action against CBS, Inc. in federal district court, alleging that the defendant breached the 1965 contract entered into between plaintiff and Films, which was asserted to be the alter ego of the defendant. The parties having stipulated that the issues involved would be determined in accordance with the substantive law of the State of New York, the district judge concluded that Films was merely an instrumentality of the defendant, and he proceeded to treat the two corporations as one. With respect to the merits, the district court held that the defendant, by developing and producing Cowley's fashion show, breached the 1965 contract's implied covenant of good faith and fair dealing, and the court awarded damages in excess of $200,000.

On appeal, the defendant complains (1) that the plaintiff failed to adduce sufficient proof so as to justify invocation of New York's instrumentality rule in order to disregard the corporate indentity of Films, (2) that the court below erroneously interpreted the 1965 contract, and (3) that the trial court erred in its computation of damages. Finding ourselves in complete agreement with the defendant's first assertion, we reverse the judgment of the district court. Because we conclude that neither

[1]This factual recitation is a condensation of the findings of the district court.

the findings of the district court nor the evidence introduced at trial will support corporate monism, we do not reach the issues involving contractual interpretation and computation of damages.

It is elemental jurisprudence that a corporation is a creature of the law, endowed with a personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability. There does exist, however, a large class of cases in which the separateness of a corporate entity has been disregarded and a parent corporation held liable for the acts of its subsidiary because the subsidiary's affairs had been so controlled as to render it merely an instrument or agent of its parent. See generally W. Fletcher, Private Corporations § 43 (perm. ed. rev. repl. 1963). But the dual personality of parent and subsidiary is not lightly disregarded, since application of the instrumentality rule operates to defeat one of the principal purposes for which the law has created the corporation. Rapid Transit Subway Construction Co. v. City of New York, 1932, 259 N.Y. 472, 182 N.E. 145. Therefore, to justify judicial derogation of the separateness of a corporate creature, an aggrieved party must prove something more than a parent's mere ownership of a majority or even all of the capital stock and the parent's use of its power as an incident of its stock ownership to elect officers and directors of the subsidiary. Stone v. Cleveland C. C. & St. L. Ry., 1911, 202 N.Y. 352, 95 N.E. 816; Gonzales v. Ametek, Inc., 1966, 50 Misc. 2d 62, 269 N.Y.S. 2d 616.

In formulating a basis for predicating liability of a parent corporation for the acts of its subsidiary, courts have developed various legal theories and descriptive terms to explain the relationship between a subsidiary and its dominating parent. For example, under the "identity" theory the separate corporate entity of the dominated subsidiary is disregarded and the parent and subsidiary are treated as one corporation. See United States v. Lehigh Valley R.R., 1911, 220 U.S. 257, 31 S.Ct. 387, 55 L.Ed. 458. Furthermore, a dominated subsidiary has been labeled an instrument, agent, adjunct, branch, dummy, department, or tool of the parent corporation. See, e.g., New York Trust Co. v. Carpenter, 6 Cir. 1918, 250 F. 668. In Lowendahl v. Baltimore & O. R.R., 1936, 247 App. Div. 144, 287 N.Y.S. 62, aff'd, 272 N.Y. 360, 6 N.E.2d 56, a New York court analyzed the various terms and legal theories and concluded that the instrumentality rule furnished the most practical theory for toppling a parent corporation's immunity. The court in Lowendahl then postulated the following three elements as the quantum of proof necessary to sustain application of the instrumentality rule:

> "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> "(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

"(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

287 N.Y.S. at 76.

Applying these three elements to the relationship between the defendant and Films in the case at bar, we first turn to the lower court's factual determinations. The district court held that at all relevant times Films was merely an instrumentality of the defendant based on the following findings: (1) the board of directors of Films consisted solely of employees of the defendant; (2) the organization chart of CBS, Inc. included Films; and (3) all lines of employee authority from Films passed through employees of the defendant and other subsidiaries to the chairman of the board of CBS, Inc. In addition, the trial judge was greatly influenced by the fact that several witnesses, including a comptroller of one of the defendant's subsidiaries, testified that Films was a "division" of CBS, Inc. Comparing these several facts to the requisite quantum of proof necessary to satisfy Lowendahl's "control" element, we think it is obvious that these factual determinations, standing alone, are insufficient to sustain application of the instrumentality rule. Moreover, an independent examination of the record in this case convinces us that the evidence adduced below concerning the relationship between the defendant and Films could not sustain any finding that the defendant completely dominated not only the finances, but the policy and business practice of Films.

Without considering for the moment the testimony concerning Films' status as a "division" of the defendant, the findings of the district court deal exclusively with the

existence of the defendant's potential to control or dominate its subsidiary Films. In our opinion complete stock ownership, common officers and directors, and the use of organizational charts illustrating lines of authority are all business practices common to most parent-subsidiary relationships, and such proof of a parent's potential to dominate its subsidiary is precisely the kind of evidence that New York courts have consistently rejected as insufficient in proving a community of management between corporations. See, e.g., Berkey v. Third Ave. Ry., 1926, 244 N.Y. 84, 155 N.E. 58; Stone v. Cleveland C. C. & St. L. Ry., supra; Lowendahl v. Baltimore & O. R.R., supra. Furthermore, with respect to the testimony concerning Films' status as a division of the defendant, we think this evidence under New York law is equally unpersuasive. Affixing labels to corporate relationships for purposes of showing a parent's complete domination of a subsidiary is a dangerous business. As Justice Cardozo, speaking for the New York Court of Appeals in Berkey v. Third Ave. Ry., supra, 155 N.E. at 61, stated:

> "The whole problem of the relation between parent and subsidiary corporations is one that it still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or a 'dummy.' All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation."

Thus, courts have employed various labels or metaphors to describe those certain corporate relationships in which the underlying facts reveal that a parent corporation has completely dominated the business practices of its subsidiary. For such purposes epitomical terminology is useful. But when a lay witness testifies that one corporation is a division of another, then individual thought indeed becomes enslaved for a court to assume that the use of a descriptive term, by some process of testimonial osmosis, automatically introduces into evidence a composite of facts tending to show a community of management. Just as siamesing is a biological fact, so must corporate umbilication be anatomically demonstrated under New York law. For purposes of application of the instrumentality rule, descriptive characterization is simply not an adequate alternative to a factual showing of the essential "act of operation."

Our perquisition of the record in this case reveals that the evidence concerning the defendant's "act of operation" is totally insufficient to sustain any possible finding that, with respect to the transaction attacked, Films possessed at the time no separate mind, will, or existence of its own.[2] The only evidence tending to show the defend-

[2]It is noteworthy that the evidence adduced at the trial concerning the relationship between the defendant and Films resulted solely from the direct and cross examination of the plaintiff's witnesses. After the plaintiff rested his case the trial court rejected the defendant's offer of evidence relating to its denial of corporate amalgamation in the following terms:

"THE COURT: What evidence do you have? It is a matter of law.

MR. GIRDEN: We did not go into the matter fully when Mr. Diggs testified. Mr. Diggs was the operating head of CBS Films, Inc. We did not go into it with him on the delineation

ant's actual participation in the business of its subsidiary is the deposition testimony of Films' general manager. As stated in plaintiff's brief, the general manager admitted that "he answers directly to the President of CBS Television Services Division who answers directly to the

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between the two corporate entities, which we deal with in our memorandum of law, too.

If we have to rebut this position, and we still say there is not one iota of evidence put in by the plaintiff on this point, I will probably have to call down the now operating head—

THE COURT: For what? What are you going to put in that way? What are you going to ask him?

MR. GIRDEN: To prove that the acts of CBS Films cannot be imputed to the liability of CBS, Inc., under this cause of action.

THE COURT: That is a matter of aw. That is not a matter of fact.

MR. GIRDEN: But there are facts from which it can be drawn.

THE COURT: Like what facts? That Mr. Diggs has not testified to?

MR. GIRDEN: The fact that CBS Films, Inc., was in competition with CBS, Inc.

THE COURT: Let us even assume that. What difference does that make?

MR. GIRDEN: This would be a separate corporate entity selling to all networks and having made virtually no sales ever to CBS Television Network. I think there was one in 1958.

MR. BLACK: Your Honor, the fact of the matter is Mr. Girden has admitted that CBS Films, Inc., is operated by employees of CBS.

THE COURT: That is already in.

MR. BLACK: Operating in the line and scope of their employment.

THE COURT: I know that. That is already in the thing.

MR. BLACK: What can he show? He has had it on that issue.

THE COURT: I am going to think about this overnight. You do not have to bring on any evidence. Let us go on whatever else you have got."

President of the CBS/COMTEC Group who answers directly to the Vice President of CBS who answers directly to the President of CBS." In our opinion, however, all of this "answering" is insignificant. This testimony relates to the present-day relationship between the defendant and Films, and New York law requires "that the unlawful control must be shown to have been exercised at the time the acts complained of took place." Lowendahl v. Baltimore & O.R.R., supra, 287 N.Y.S. at 76-77. Furthermore, the only evidence concerning the corporate relationship during the period in which the transaction involved herein occurred negates any assertion that Films was being operated as the alter ego of the defendant. The uncontradicted testimony of Mr. Sam Cook Digges, former administrative vice president of Films, is as follows:

"Q What was the relationship of CBS Films, Inc. to CBS Television Network?

A Many of the programs that were telecast on the CBS Television Network eventually went into distribution through CBS Films. Those shows were distributed concurrently with the network run overseas. In other words, when Perry Mason was being telecast in this country, on the network at the same time we were selling it in some 80 countries overseas. After Perry Mason again, for example, came off the network, we distributed it in this country market by market.

Q For what period of time did you act as the administrative vice-president or operational head of CBS Films. Inc.?

A From 1959 to 1967.

Q In this eight-year period, Mr. Digges, did you ever sell a program from CBS Films, Inc., to CBS for network broadcast?

A Yes, we did. We sold many of the Terry-Toon products in the Saturday morning kid block.

We also sold a program when we were in the production end of the business also producing shows called Angel. This was a program that was produced by Jess Oppenheimer, who developed the Lucy series. Angel was on the CBS Television Network for one year. It was on Thursday night. That was a pretty bad night for CBS. It had the highest rating of any show on Thursday night, but that wasn't good enough.

We made a number of network pilots, attempted them. We made four or five high budget network pilots and attempted to sell them to CBS.

Q Did you make any sales to CBS?

A Not except for the Angel show.

Q Did you make any sales to any other network?

A Yes. The sale was made prior to the time I joined CBS, but the show was still running when I was there. That was a program called Navy Log, which was sold to ABC.

We also sold a show called the Children's Doctor, which is a five-minute medical series, a pediatrician, to the ABC Television Network.

Q Is there any contractual commitment for the network to broadcast any product that is produced by CBS Films, Inc.?

A No, there isn't. My life would have been easier if there had been such an arrangement.

Q Of the properties that CBS Films, Inc., would be distributing, was there any obligation on the part of CBS Films, Inc., to sell it to the CBS Television Network?

A No, there was not."

Faced with both this testimony and the total absence of any evidence showing the defendant's actual domination of its subsidiary Films during the period in which the plaintiff's contract was executed and allegedly breached, this court has no alternative but to reverse the decision of the district court on the simple basis that plaintiff has failed to prove, in accordance with New York law, that Films was the alter ego of the defendant. We reiterate that under the substantive law of the State of New York a parent's potential to dominate its subsidiary is insufficient to justify application of the instrumentality rule. New York law respects corporate identity, and its destruction by piercing or surrogation requires substantiation of facts, not just organizational charts and labels. The instrumentality referred to in New York cases requires a specific kinetic result, and muscularity to effectuate such result must be demonstrated. Plaintiff's omission in proving such muscularity constitutes his failing.

The judgment of the district court is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

JEROME J. BERGER,

Plaintiff-Appellee,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

[Filed Mar. 7, 1972]

ON PETITION FOR REHEARING

Before TUTTLE, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1562

D. C. Docket No. 68-9 CF

[TITLE OMITTED]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court with directions to enter a judgment for Appellant on both Counts I and II;

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

January 10, 1972

Issued as Mandate: Mar. 15, 1972

(EXCERPTS FROM APPENDIX OF RECORD OF TRIAL PROCEEDINGS)

VOLUME 2 APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

[TITLE OMITTED]

Appeal from the United States District Court
for the Southern District of Florida

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[996] MR. GIRDEN: It is not.

Secondly, plaintiff is trying to proceed on some sort of a theory that it is the title, the Model of the Year, which has been stolen here. This would be the contest of selecting a model of the year.

Well, Your Honor, there is no cause of action pleaded for a title claim or for unfair competition and there couldn't be because there is no proof of any secondary significance redounding to the title, Model of the Year.

THE COURT: I do not think he has to prove a cause of action based on the title.

MR. BLACK: And I have not tried to, Your Honor.

THE COURT: I have reference to the title Model of the Year.

I am not concerned about that. That is not part of what is in my mind.

MR. GIRDEN: That is the basis of my motion, Your Honor.

MR. BLACK: Your Honor, might I state—

THE COURT: No. I am going to overrule his motion.

VOLUME 3 APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

[TITLE OMITTED]

* * *

[1705]

credible evidence of those costs with enough specificity to provide the court with a solid guide; and in the second place, the costs presumptively would be recovered in the license fees.

Therefore, plaintiff shall have judgment against defendant in the amount stated above, plus interest from August 30, 1967, and costs, on count II of his complaint. [A party cannot recover on an express contract and an implied contract, whether in fact or in law, on the same set of facts.] Since plaintiff is entitled to recovery for breaches of implied covenants of good faith and fair dealing in his express contract with CBS, he may not have recovery on any theory of implied contract. For that reason, count I of the complaint shall be dismissed.

This Opinion constitutes this court's findings of fact and conclusions of law. The clerk of this court is directed to file this Opinion and send true copies to counsel of record. Counsel for plaintiff is directed to prepare a final judgment consistent with the views expressed.

* * *

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Supreme Court, U. S.
FILED
JUN 29 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1578

JEROME J. BERGER,

Petitioner,

against

COLUMBIA BROADCASTING SYSTEM, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

(Appendix contained herein)

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IN THE

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OCTOBER TERM, 1971

No. 71-1578

JEROME J. BERGER,

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against

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

(Appendix contained herein)

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 453 F.2d 991 (1972). Both this opinion and the unreported opinion of the United States District Court for the Southern District of Florida—Miami Division are printed as appendices to the petition for a writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1972. The petition for a writ of certiorari was filed on or about June 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Does the "clearly erroneous" rule of F.R.C.P. 52(a) apply where a Court of Appeals, leaving the District Court's findings of evidentiary fact undisturbed, reverses its ultimate conclusion of mixed fact and law?

II

Does an appellee who fails to cross appeal from a judgment dismissing with prejudice a separate claim, alternative to the one on which he has received judgment, have a right to remand of the unappealed claim for preparation of Rule 52 findings and conclusions by the trial court where in addition to the failure to appeal it is clear upon the record before the Court of Appeals that the dismissed and unappealed claim is without merit?

Statement of the Case

Petitioner Berger sued respondent CBS for misappropriation of an idea or format for a television program. Berger's complaint was stated in two separate counts. It was stipulated that the case would be determined under the substantive law of the State of New York (P. App. 15).

Count I of the complaint alleged that Berger divulged his idea for a televised fashion show and "model of the year" contest among the participating fashion models to CBS and that CBS thereafter used the format but failed to compensate Berger. Berger claimed recovery in Count I for the reasonable value of his program format on a theory of implied-in-fact contract.

In Count II Berger alleged that CBS breached an express written contract between himself and CBS' wholly-owned subsidiary, CBS Films, Inc. Under this contract

CBS Films, Inc. was to distribute for sale on a "spot market" (non-network) basis a film produced by Berger of a live fashion show entitled "International Fashion Festival". The crux of Count II was the allegation that CBS Films, Inc. was the "business conduit" or "alter ego" of its parent, and that therefore the parent CBS was chargeable with breach of the covenant of good faith and fair dealing implied in its subsidiary's distribution contract with Berger. The alleged breach in Count II was CBS' subsequent contract with one Stewart Cowley providing for the yearly network telecast of Cowley's program "The Model of the Year Pageant" containing elements alleged to be so similar to Berger's International Fashion Festival as to render the latter unsaleable under the CBS Films distribution contract and thus valueless.

The District Court, sitting without a jury, granted Respondent CBS' post-trial motion to dismiss Count I of the complaint and dismissed the said Count I with prejudice to renewal in its judgment (R. App. 1). On Count II the District Court rendered judgment for Petitioner Berger in the sum of $222,750.00 plus $36,007.28 interest.

CBS appealed from the latter part of the judgment (R. App. 2) and the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court. 453 F.2d 991 (1972). Berger did not cross appeal from the District Court's dismissal with prejudice of Count I. Thereafter, Berger petitioned the Court of Appeals for a rehearing, asserting that the Court of Appeals should have remanded Count I to the District Court for findings of fact and conclusions of law with respect to its claim for breach of implied contract. Rehearing was denied, and a mandate issued directing the District Court to enter judgment for Respondent CBS dismissing both counts of the complaint (P. App. 26).

ARGUMENT

POINT I

There is no error with respect to the application of the "clearly erroneous" rule of F.R.C.P. 52(a).

What petitioner calls a "finding of fact" by the trial court, i.e., that CBS Films was merely an instrumentality of respondent CBS, is quite obviously the trial court's mixed conclusion of law and fact, reached by it upon findings of evidentiary fact which the Fifth Circuit, in reversing, did not dispute (See Court of Appeals opinion, Petitioner's App. 12 at 18).

There can be no question that the "clearly erroneous" rule found in F.R.C.P. 52(a) does not bind an appellate court to follow the ultimate factual or legal conclusions of a trial court, *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-396 (1948), and no question that this was fully understood by the Fifth Circuit. See, e.g., *United States* v. *Richberg*, 398 F.2d 523, 530 (1968) (Goldberg, J.); *Bullock* v. *Tamiami Trail Tours, Inc.*, 266 F.2d 326, 330 (1959).

The New York law as to disregarding separate corporate identity, recognized and applied by the Fifth Circuit (P. App. 16-24) and not challenged by petitioner Berger, is that there must be actual exercise of control over the operation of the subsidiary by the parent at the time and in respect of the transactions complained of. Mere ability to exercise such control is not sufficient. The Fifth Circuit reversed simply on the ground that the trial court's ultimate conclusion of law and fact to the effect that CBS Films had no separate corporate identity could not be sustained by its specific findings.

National Bond Finance Co. v. *General Motors Corp.*, 341 F. 2d 1022 (8th Cir. 1965), is not in any sense in conflict

with the decision of the Fifth Circuit below. In *National Bond* the Eighth Circuit held that the trial court correctly stated the applicable law, made findings of fact supported by substantial evidence in the record and correctly applied the law to such facts, all properly resulting in its determination that the defendant's subsidiary was not its instrumentality. The Eighth Circuit necessarily viewed the trial court's findings in light of the "clearly erroneous" rule since the record did contain conflicting evidence regarding the defendant parent corporation's actual control of its subsidiary. As shown below the Fifth Circuit found that the record at bar contained no evidence in support of the correct rule of substantive law.

Although it appears that the true response to petitioner, as stated above, is that the "clearly erroneous" rule doesn't apply to ultimate conclusions of law and fact of the sort made by the Fifth Circuit below, an alternate response would be that the rule was inapplicable because the relevant evidence on the question of corporate identity did not involve evaluation of the candor and creditability of witnesses. *United States* v. *United States Gypsum Co., supra* at 395; *Orvis* v. *Higgins,* 180 F.2d 537, 539 (2nd Cir.) *cert. den.* 340 U. S. 810 (1950). Any doubt that the Fifth Circuit failed to consider the "clearly erroneous" rule and to make a determination that the trial court's finding was "clearly erroneous" is dispelled by the final paragraph of its opinion where it refers to "the total absence of any evidence showing defendant's actual domination of its subsidiary Films during the period in which the plaintiff's contract was executed and allegedly breached . . ." (See Court of Appeals opinion, P. App. 12 at 24).

Also, Rule 19-1(b) of this Court does not provide grounds for the granting of a writ of certiorari where, as here, the only possible conflict of decisions relates to questions of standards of proof and sufficiency of evidence under state law, and where, indeed, such conflict has been shown not to exist at all.

POINT II

The Court of Appeals correctly mandated entry of judgment for respondent on both counts of the complaint.

Petitioner Berger's contention that the mandate of the Court of Appeals deprived him of his "day in court" with respect to his implied in fact contract count is utterly without merit. As reflected by the record on appeal, and not disputed by petitioner, this count was fully tried by both sides. All that remained and was not done, since the trial court rendered judgment for Berger on his alternative count, was the preparation of Rule 52 findings and conclusions.

But the record is nevertheless clear that, after all the evidence was in, petitioner had failed to make out any case for the existence of an implied in fact contract. Respondent CBS accordingly moved to dismiss Count I on the appropriate substantive grounds, and the District Court in effect reserved decision thereon (R. App. 11-14). At the close of all evidence respondent's motion, reiterated on the same substantive grounds, was granted (R. App. 17). This, plus petitioner's failure to preserve his right to attack the trial courts' dismissal with prejudice of his implied in fact contract by effecting a cross appeal has properly resulted in barring petitioner from enjoying yet another "day in court".

Petitioner's first count, asserting his claim for breach of an implied contract, was separately stated and was, in fact, separate from and alternative to his second count for breach of an express contract. As this Court has many times determined, a judgment dismissing a separate claim with prejudice is not subject to appellate court consideration or modification, including remand for further substantive action, unless an appeal has been taken from it. *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250-251 (1937); *See also*,

Morley Co. v. *Maryland Casualty Co.*, 300 U. S. 185, 191-192 (1937); *Le Tulle* v. *Scofield*, 308 U. S. 415 (1940); *Penfield* v. *S.E.C.*, 330 U. S. 585, 594 (1947), reh. den. 331 U. S. 865 (1948). Respondent CBS' appeal brought up for consideration by the Fifth Circuit only the question of the correctness of the trial court's judgment on the express contract count and petitioner Berger's failure to cross appeal from the dismissal with prejudice of his first count in implied contract precluded the Court of Appeals from making any disposition with respect to such count.

In spite of petitioner's failure to cross appeal it is nevertheless apparent that the Court of Appeals reviewed the record regarding the implied in fact contract count and determined that it could not prevail. This review undoubtedly took place following Berger's petition for rehearing, where among other issues, he raised the question of remand of this count. After receipt of the petition for rehearing the Fifth Circuit, ignoring all of its other points, requested respondent CBS to address its reply to that portion of the petition which urged remand of the implied contract count for findings by the trial court. In response to this request the CBS memorandum argued that Berger was barred from a remand by his failure to cross appeal and went on to show exhaustively how the record precluded Berger from any implied contract recovery.

The dispositive issues on the substantive question and the state of the record concerning them are as follows:

1. *Respondent did not use petitioner's idea.* Respondent's "Model of the Year Pageant" was packaged in its entirety and supplied to it by Stewart Cowley. The unimpeached testimony of Sandy Howard and Cowley established that Howard and Cowley had collaborated in the creation of the basic idea of the Model of the Year Pageant in 1962 without knowledge of or access to petitioner's concept (R. App. 3-6, 14-16). Such uncontradicted proof of the independent creation was itself sufficient to preclude plaintiff's claim for breach of implied contract. *Turntable Products Co.* v. *Radio Corp. of America*, 155 N.Y.S. 2d 73

(Sup. Ct. 1956); *Bailey* v. *Haberle Congress Brewing Co.*, 193 Misc. 723, 85 N.Y.S. 2d 51 (Mun. Ct. 1948); *Pinci* v. *Twentieth Century Fox Film Corp.*, 95 F. Supp. 884 (S.D.N.Y. 1951).

2. *Petitioner's idea lacked objective originality.* Respondent CBS proved below that petitioner's idea was a commonplace in the television broadcast industry with uncontradicted documentary evidence, consisting of a format for a fashion show actually televised over the CBS TV network in 1951 in which a "Cover Girl of the Year" was selected; this was petitioner Berger's format, but ten years earlier in time (R. App. 16). CBS also proved that six other formats containing the same premise were submitted to the American Broadcasting Company during the years 1948 to 1961 (R. App. 8-11). In view of the clear New York law requiring "novelty", this evidence also required the dismissal of Count I on the merits. *Bristol* v. *The Equitable Life Assurance Soc'y*, 132 N. Y. 264, 30 N.E. 506 (1892); *Grombach* v. *Fred M. Waring*, 293 N. Y. 609 59 N.E. 2d 425 (1944); *Soule* v. *Bon Ami Co.*, 201 App. Div. 794, 195 N.Y.S. 574 (2d Dept. 1922), aff'd 235 N. Y. 609 (1923); *Bram* v. *Dannon Milk Products, Inc.*, 33 A.D. 2d 1010, 307 N.Y.S. 2d 571 (1st Dept. 1970).

3. *Petitioner publicly presented, and therefore forfeited, his program idea.* Petitioner's admission that in 1961 he initially solicited CBS' consideration of his fashion show idea by gratuitously divulging it (R. App. 6-7) also separately required dismissal of Count I on the merits. *Grombach* v. *Waring, supra.* Peitioner's public presentation in Las Vegas in 1965 of his International Fashion Festival and subsequent distribution with his authorization of a film of the International Fashion Festival (R. App. 7-8) accomplished the same result. *Herwitz* v. *National Broadcasting Company, Inc.*, 210 F. Supp. 231 (S.D.N.Y. 1962).

As a result of this unambiguous record respecting petitioner Berger's claim for breach of implied contract the Court of Appeals was in a position to reach its own eval-

uation of the record without the aid of Rule 52 findings and conclusions. The Court of Appeals was entitled to do this, *Urbain* v. *Knapp Brothers Manufacturing Co.*, 217 F.2d 810, 816 (6th Cir. 1954), cert. den. 349 U. S. 930 (1955); *Girard Trust* v. *Amsterdam*, 128 F.2d 376 (5th Cir. 1942); *Seligson* v. *Roth*, 402 F.2d 883 (9th Cir. 1968); *Hurwitz* v. *Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943); *Sbicca-Del Mac, Inc.* v. *Millius Shoe Co.*, 145 F.2d 389, 400 (8th Cir. 1944); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F.2d 1, 3-4 (4th Cir. 1942), and in view of its stated concern with the question of remand and its denial of Berger's petition for rehearing without comment, must be understood to have considered and relied upon both the procedural and substantive arguments advanced against remand of the implied contract count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that three copies of the foregoing Brief for Respondent in Opposition to a Petition for a Writ of Certiorari were furnished on the 5th day of July, 1972 to the following:

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Final Judgment of District Court.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA—MIAMI DIVISION.

Case No. 68-9-Civ-CF

JEROME J. BERGER,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Defendant.

This action came on for trial before the Court, the Honorable John V. Singleton, Jr., United States District Judge, presiding, and the issues having been duly tried and the Court having rendered and filed an Opinion and having made therein Findings of Fact and Conclusions of Law on December 21, 1970, it is, therefore,

ORDERED and ADJUDGED, that the Plaintiff, Jerome J. Berger, recover of the Defendant, Columbia Broadcasting System, Inc., the sum of $222,750.00, plus $36,007.28 in interest, and his costs of this action on Count II of the Complaint, and it is further

ORDERED and ADJUDGED, that Count I of the Complaint be, and the same hereby is dismissed, with prejudice to renewal.

DONE and ORDERED, in Chambers, at Houston, Texas, this 20th day of January, 1971.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

App. 2

Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 68-9-Civ-CF

JEROME J. BERGER,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a New York corporation,

Defendant.

Notice is hereby given that Columbia Broadcasting System, Inc., a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 26th day of January, 1971.

Dated at Miami, Florida, this 19th day of February, 1971.

McCARTHY STEEL HECTOR & DAVIS
Attorneys for Columbia Broadcasting System, Inc.
1400 First National Bank Building
Miami, Florida 33131

By WILLIAM B. KILLIAN
William B. Killian

Excerpts From Appendix of Record of Trial Proceedings

VOLUME 1—APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1562

[TITLE OMITTED]

Appeal from the United States District Court
for the Southern District of Florida

SANDY HOWARD

[222] In 1962. It was either October or November. I don't remember the exact date.

• • •

I went to Stew with the idea of presenting a television special about the model of the year. We talked at my home at 25 Central Park West.

[223] I said in the fall of 1962. We discussed the program from all aspects at that time. We discussed it subsequently, but I did not go ahead with the show because I went back to Europe or I went to Europe to make motion pictures because I needed the money at that time.

• • •

Well, I can recall the conversation rather vividly because I had discussed this before I discussed it with Stew. I discussed it with others and others had discussed the idea with me.

[224] Basically, what I felt is that it would be a very good commercial concept to present what I would call the model of the year, to be able to bring to television those

people who are involved in the modeling business, those people who could present the clothing, the jewelry.

It was a very commercial idea, to present this on television in a pageant form, similar to Miss America, Miss USA, the outstanding model of the year and in bringing out the background of each of these young girls who would represent every segment of American society, because every young lady in America somehow thinks of herself as being a model.

I thought it would be very vicarious and it would have great magazine potential and newspaper potential and I felt it would be a very commercial television program that many sponsors would go for, whether it would be Revlon or others, and they would want to be involved with it.

I felt it could be more successful than most pageants because of the commercial aspects in presenting all of this cross-section of young women in a commercial sense.

• • •

[225] I had a series of conversations with Stew.

When I say conversations, I talked with Stew on the phone several times. We met in a place that we both frequented in New York, P.J. Clark, a restaurant on 55th Street and Third Avenue, at which time I asked Stew, I guess, from the time we met in '62 through probably '63, '64, '65, whether he was going ahead with it, and he told me at the time when I would be back from Europe or wherever I was making films, that he was deeply involved in trying to present this pageant that he felt he would go ahead, and I said, "Well, I promise you I won't feel that of all my particular idea that I submitted might be contagious," because I knew that it was in my mind a public domain idea and it was an idea that was so obvious that everybody had discussed it so many times and I didn't feel I had any priority on it and I never pretended to get any piece of the action.

• • •

Excerpts from Appendix of Record of Trial Proceedings.

[227] Therefore, my mind was very clear on the [228] subject and I remembered very specifically because it was such an obvious situation, and I didn't again claim any great priority on the idea. It was my opinion that if we were to take the young people around the country and have a series of contests that would bring the winners, similar to Miss America, to New York for this elimination and to have them compete as professionals against the professionals in the New York area, which was at that time basically the modeling center of the world, if we were to tell the backers of these youngsters and if we were to tie in the hairdressers, the clothing people, the fur people, the makeup people—I'm talking of Revlon and the very obvious sponsors—if we were to make it a Miss America of modeling and decide not to call it Miss America but to call it Model of the Year, it may be a dull program but it sure as hell could make a lot of money, and that really was what I was after at the time. I was completing the latest of my comebacks.

• • •

[229] I would say that Stew is probably one of the more knowledgeable and experienced people in the modeling business. Stew has certainly been in it longer than anybody I personally know, and his knowledge of the business is so extensive that he is one of the few people who survived in what is a very precarious business. He just knows the racket.

Stew does have the reputation of working extremely hard. He is one of those 18 hours a day, seven days a week men, and I felt that he was the kind of a person who could make up for what I did not know. I'm a producer of commercial television programs at this time [230] and of commercial motion pictures. I am not a modeling expert.

I felt that bringing Stew into the picture would cover me for my own deficiencies, and I felt he was probably the

best person I knew in the business, and I think others would feel the same. He is considered one of the top pros in that business.

• • •

This is probably not the right terminology, but in my business as a producer you think of the words public domain, an idea that we do not own. I had no concept at that time, nor do I now, that my position with a model of the year or models of the year was a new concept. It just wasn't. It had been discussed [231] too many times, and I thought yes, there may be variations on it, but I don't think any variations would be unique on this or that I could claim any kind of copyright ownership, and I said to him, "Please, be my guest. This is not a new idea, not a new concept."

He had told me, incidentally, at the time that we met and I asked Stew to come to my apartment in New York—he made it very clear in front that he had a concept of a model of the year show for a long time, and I said, "Well, I can't be terribly surprised. This is your bag, this is your racket."

So it was something that when he came up to see me, he was seeing me as a professional producer on a concept he already had, and he made it very clear to me in front to protect his own interest that it was not something that Sandy Howard had come up with, an idea about a modeling show which he obviously had had for a long time.

JEROME J. BERGER

[255] Q. Did you have any conversations with Mr. Levitan during the production of that show about the future? A. Yes, I did.

Q. What types of conversations did you have with him, sir? A. I had one conversation in particular with Paul Levitan. It was during a break, as I remember, a break

in rehearsal. I came over and sat down with Paul. I think we were having coffee or we were sitting in the empty auditorium during a break.

I said, "Paul, I have been interested in getting into the field of television and getting away from these theatricals and trade shows. I have an interesting concept of a show and I would like your advice as to how I can get it with CBS," because my first and only actual association with network television was with Paul.

I outlined to him the basis of what I had conceived as the International Fashion Festival, and to the best of my recollection it embodied, number one, the use of high fashion in conjunction with a contest in- [256] volving models.

Another facet of the show was the use of designers, so that when I would use the words "model of the year," I could also use the words "designer of the year."

I further said that I thought entertainment would have to be an integral part of the show, and that was what I outlined to Paul.

Paul said, "Jerry, we've got a job to do here. When we finish here, you come up to New York and I'll be happy to sit down and talk to you about it and help you get it on CBS."

The Court: What year was this?

The Witness: 1961. It would be in July, Your Honor.

* * *

[329] Q. Mr. Berger, we were discussing the 1965 International Fashion Festival and the wild footage that was converted into a movie in connection with it.

How did that movie sell? A. Not well at all, Mr. Black.

Q. Do you know where it sold? A. The only reports I got back were that it was sold in Los Angeles, it was sold in Las Vegas. I know I got one copy print from Ohio,

which they never indicated it was—CBS never indicated it was shown there, but it came from a station in Ohio. I needed it for a showing here in Miami on Channel 10.

• • •

VOLUME 2—APPENDIX

KAY MURPHY

[654] Q. Have you ever heard the name Jerome J. Berger? A. Yes, I have.

Q. In what connection did you hear the name? A. He submitted a proposal to ABC.

[655] Q. Was it a solicited proposal or unsolicited? A. Unsolicited in our concept of the word. I don't, you know—

• • •

Q. Did you bring with you the synopsis that you maintained in the records of ABC pertaining to an unsolicited submission from Jerome J. Berger? A. One of them, I did.

Q. Was there more than one? A. Yes. There were two.

Q. Which one did you bring? A. I believe the one submitted in 1964. I did, possibly '64.

• • •

[656] This is a two-page memo about a program proposal that Mr. Berger had brought to ABC entitled International Fashion Festival.

Mr. Girden: I would like to offer this into evidence as Defendant's Exhibit No. 8.

[657] The Court: It will be received in evidence.

• • •

[658] Q. [By Mr. Girden] Could you read the last paragraph on the third page, please. A. This is the memo here?

Excerpts from Appendix of Record of Trial Proceedings.

Q. Yes. A. Excuse me.

"Mr. Berger has approached both CBS and NBC with this idea and says that interest was evinced. Because of his desire to use Edith Head he says he would prefer to do the show on ABC and will not deal with anyone else until his return from Europe in a month."

Q. Miss Murphy, did I ask you to go through your files at ABC to try to find any either submissions or broadcast programs prior to the year 1967 which com- [659] bined the elements of fashion show and beauty contest? A. Yes, you did.

Q. Have you found any such programs? A. Yes.

Q. Could you please show us which ones you have been able to locate?

The Court: Submissions?
The Witness: Yes.

Q. [By Mr. Girden] You may proceed. A. A submission to ABC— I don't know how much detail you want.

This was a half-hour serial built on quoting—built on the idea of introducing America's cover girls, having them display their obvious and hidden talents, relating their unusual human interest stories.

Q. When was that submitted? A. Well, it was received at ABC on June 12 of 1961.

Q. Were there any others? [660] A. This is something called Let's See The Girls, submitted in 1949. This combines the appeals of a fashion show, talent-hunt, beauty contest and comedy show. All girls are eligible to audition for the show whether they come from model agencies, talent agencies the legitimate theatre or the general public. The loveliest and most talented of the girls are chosen to appear on the show. They are costumed in the most fashionable gowns, furs and accessories. They then ap-

pear on the show demonstrating their beauty and talent. The viewing audience picks the winner.

Q. What is the next one, Miss Murphy? A. A program proposal entitled Appointment with Glamour, submitted in November of 1954 and received at ABC [661] in November of '54.

It would be a program in which girls who believe they have photogenic qualities and modelling ability would be given an opportunity to win a modelling assignment.

Girls would submit snapshots and then be assembled as contestants. This would be a premiere showing of Dior collections and the girls would take on specific modelling assignments.

[662] Q. Go to the next one. A. A submission entitled Meet Your Cover Girl received at ABC in August of 1958.

The Court: I thought we had that.

Mr. Girden: This is an earlier submission, Your Honor.

The Court: When was this?

Mr. Girden: She has read from a similar one on The Cover Girl.

Q. [By Mr. Girden] Go ahead. A. A program entitled Get Up and Go received at ABC in September of 1953.

It presented a fashion show feature with a panel of famous fashion designers, stylists and columnists, a commentator and models of all sizes. It would be a contest between those to choose the Fashionplate Girl of the Week.

[663] Q. Miss Murphy, do any of your records indicate prior broadcasts, actual broadcasts of programs combining the two elements we are talking about?

* * *

[664] The Witness: I don't have actual broadcasts, but this is, for instance, a clipping from Va-

riety dated September 20, 1961. It's a review of a show called Fashion Spectacular broadcast on WFIL-TV in Philadelphia. It's a thirty-minute spectacular of fashions from abroad presented and modelled.

* * *

[666] Mr. Girden: According to the way I have them marked here, we then have in evidence Defendant's Exhibits 11, 13, 14, 10 and 8, as well as 9?

Motion to Dismiss First Cause of Action and Ruling Thereon.

[984] Mr. Girden: Now I want to make a motion to dismiss the first cause of action.

* * *

[985] The plaintiff's burden under the first cause of action is to prove that the defendant wrongfully appropriated property, in violation of an implied in fact contract.

* * *

An implied agreement to compensate him.

I think we have stipulated this is to be determined under the laws of the State of New York. There is no tortious recovery for this type of cause of action in New York. It would have to be under an implied—

* * *

It is characterized by implied in fact or implied in law quasi contract.

* * *

[988] The basis of my motion is the plaintiff has the burden to prove an appropriation on his case. Under the laws of the State of New York, the plaintiffs must show to the n'th degree, in an appropriation or quasi-contract or an implied in fact theory that he had the property, that it was protectable and that if it was protectable he did

protect it and that if he did protect it the defendant wrongfully used it and that if the defendant wrongfully used it, the defendant has been unjustly enriched by it.

• • •

[989] We are saying the plaintiff to have property must have proven in his case that he had a unique, novel and original idea, adequately reduced to concrete form prior to any unsolicited disclosure; that there wasn't any unsolicited disclosure which would cause a forfeiture or dedication; that there has been no subsequent forfeiture or dedication of any idea allegedly used by defendant putting it in the public domain.

We contend that there is no evidence in this case that the plaintiff had anything reduced to concrete form prior to June of 1966, when he submitted a script to both Foote, Cone & Belding and to Mr. Campus at CBS.

There is not a scrap of writing that predates about June 1, 1966. The only other evidence of concrete form was the film, which was shown to Your Honor, of the International Fashion Festival, on or about April 1, 1965.

The only thing in that film which has any relation to this case—there is no contest, there is no judging, there is no nothing, except an award at the end of a plaque to a model of the year, which wasn't even filmed at Las Vegas because it was dubbed in with a black and white photograph, which was edited here in New York.

• • •

[990] Now, Your Honor, even if CBS saw this film, if Mr. Levitan saw the film or saw the presentation and saw the element of an award being given to a model of the year and took that and built a program himself around that, that would not give plaintiff a cause of action, because in the first place, the idea is only a bare, basic idea, not reduced to concrete form; secondly, when it was disclosed to Mr. Levitan, by plaintiff's own testimony, unsolicited, it was forfeited and dedicated to the public;

thirdly, when it was broadcast over the air, Herwitz versus NBC, in the Federal Court of New York, the basic idea, which is unprotectable, was forfeited and dedicated to the public.

Under the plaintiff's own testimony, when he made unsolicited submissions to Foote, Cone & Belding, ABC and NBC, the plaintiff forfeited and dedicated any rights he may have had in and to the idea.

• • •

[995] We are claiming the first unsolicited disclosure from plaintiff to Mr. Levitan back in 1961, constituted the forfeiture or dedication. There is nothing in confidence in that disclosure. He went to Levitan to find out how can he get this on television. Mr. Levitan gave him advice, by Mr. Berger's own testimony.

The other point I wanted to raise is that plaintiff has this problem: The problem is either what he claims to have been his property did not achieve the dignity of property because it was not novel, original, unique or sufficiently reduced to concrete form, and thereby flows into the common domain, and if he did in some form or fashion, I don't see how, reduce it to concrete form, with enough protectability and protection, he did not protect it under the Sears and Comco cases, and upon any disclosure it is forfeited, dedicated, Your Honor, in the Sears and Comco cases, and delineated in the field of literary property by one of Mr. Black's favorite cases, and I tried the case in the Federal Court in Rhode Island, and it was reversed by the First Circuit.

[996] Secondly, plaintiff is trying to proceed on some sort of a theory that it is the title, the Model of the Year, which has been stolen here. This would be the contest of selecting a model of the year.

Well, Your Honor, there is no cause of action pleaded for a title claim or for unfair competition and there

couldn't be because there is no proof of any secondary significance redounding to the title, Model of the Year.

• • •

That is the basis of my motion Your Honor.

• • •

The Court: No I am going to overrule his motion.

[997] In the first place, I would overrule your motions.

Mr. Girden: Are you denying it or reserving decision, Your Honor?

The Court: On your motion, I am just going to overrule it at this time.

• • •

VOLUME 3—APPENDIX

STEWART COWLEY

[1202] Well, other than my brother and sister-in- [1203] law and mother in the early days, the first discussion I had with an outsider was with a man called Oleg Cassini. We used to play golf a lot.

In 1961, when I started my new company, we were very seriously discussing forming a partnership for my new company and he was going to be one of the major elements of it. At that time we had discussed this pageant as a gimmick, a search for models, a beauty pageant for models as a part of a piece of the company that we would be forming. It would be a separate operation, but it would be an interesting way to discover the talent and maybe make some money.

• • •

There was another party involved, who had a stock right at that time, and he became incapacitated and the whole thing died.

At that time Oleg was a great traveller. He would travel with his clothes and he would do these fashion shows

all over the country, more so than most designers, I would say. Every city he would go to he would have the girls there and he would be scouting girls ahead of him to have girls available among the local [1204] girls to show the clothes when he would put these little shows on for the local people.

It seemed like every city he went to he would come up with a beautiful girl of some kind and he seemed like a pretty good fellow to have to be involved with. Besides, the third party was to him and the third party was very important to this project. The third party was going to put the money in.

* * *

[1205] Well, as I recall, we had been in business less than a year. We had been making a big impression on the industry when we opened our new companies. We had a good flying start when we opened up.

Sandy called me up. He was at that time a producer of motion pictures or television films and projects. He called me and thought we should have a talk about a plan he had or a thought he had about a documentary or a special on the modelling business and he invited me over to his home to discuss it.

Naturally, I went, because in our business publicity is important and we like to be known throughout the country.

* * *

Well, we discussed the special of modelling and I naturally thought that was a good idea if we were [1206] included in it, which he had planned to do. At that time I thought that if he could do something like this about the modelling industry, this might be an opening for us to get our pageant launched and so I divulged to him what I had been planning and thinking about.

* * *

I told him I had been planning and hoping to do a beauty pageant featuring models where the prize would be a career for the lucky girl and maybe even the losers, but it would be a pageant that dealt with that cool, slim, elegant look that we look for in our business, and it would sort of be a way to bring New York to the boondocks, go out there and bring ourselves to the girls out there in the little towns around the country, instead of waiting for the girls to come to us in New York, many of whom just never do because they don't have the nerve or the ambition or maybe they are just plain scared. I don't know what it is, but a lot of talent out there just never gets to New York.

• • •

Well, Sandy and I talked about it several times. We had several meetings. He was interested. He [1207] thought it was a great idea, and we were going to do it together.

We discussed this matter over a period of two or three years. The problem was he was always having to run off to Europe or somewhere on other projects and we would be interrupted each time. It finally just died.

• • •

Evidence of Non-Originality

[1291] Mr. Girden: I would like this marked as a collective exhibit for the defendants.

[The document referred to was marked as Defendant's Exhibit No. 23 for Identification.]

Mr. Girden: This is a program that was broadcast by CBS in 1950 and 1951, which is a selection of a cover girl of the year by the very defendant • • •

• • •

[1293] The Court: Defendant's Exhibit No. 23 will be admitted into evidence.

• • •

Excerpts from Appendix of Record of Trial Proceedings.

JEROME J. BERGER (Cont'd)

[1324] Q. [By Mr. Girden] Mr. Berger, did you ever submit your program concept to the American Broadcasting System? A. I am certain Mr. Hartman did. I don't recall whether a submission was made by me, but Mr. Hartman, who was my agent, did make a submission.

[1325] Q. Did you ever make a submission to the National Broadcasting Company, Inc.? A. Yes, I did.

Renewal of Motions.

Mr. Girden: Your Honor, at this time I would like to renew my motions to dismiss the first and second counts on the same grounds as stated before, and as to the first count upon the additional ground of the independent creation of the Model of the Year pageant by Mr. Cowley and his organization.

The Court: Well, I will hear you all in the morning briefly on what you conceive that you have and have not proven or what you conceive to be the law.

* * *

[1677] Mr. Girden: At this time I would like to renew my motion to dismiss the first cause of action. You have made a ruling on the second cause of action. The first cause of action is the implied contract and the implied law in a quasi contract.

The Court: I think I will have to grant that motion.

* * *

[1688] Mr. Girden: Is the dismissal you granted as to the first count with prejudice?

The Court: With prejudice; yes, sir.

* * *

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court

of the

United States

OCTOBER TERM, 1972

No. 71-1578

JEROME J. BERGER,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
a New York corporation,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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CBS asserts that Berger cannot argue that he has been denied findings of fact and conclusions of law on his theory of implied contract with CBS, Inc. because he did not raise the issue in a cross-appeal. This position (along with CBS' other positions) is completely without merit since Berger had no reason whatever to take a cross-appeal

after he was awarded the full relief that he had sought. In fact, the trial judge dismissed the alternative implied contract count only because recovery could not be had on both express and implied contract theories. Thus a cross-appeal on the issue of implied contract would have been subject to summary dismissal as frivolous. Cf. *United States v. Johnson*, 327 U.S. 106, 113 (1946).

The cases cited by CBS, Inc. at Page 6-7 of its Brief do not support the assertion that Petitioner was required to cross-appeal. Each case cited involved the failure of an appellee to cross-appeal on a claim separate and independent from the claim raised on appeal by the appellant. Specifically, in both *Helvering v. Pfeiffer*, 302 U.S. 247 (1937) and *LeTulle v. Scofield*, 302 U.S. 415 (1940), two distinct taxation claims were involved. Likewise, in *Penfield v. SEC*, 330 U.S. 585, 594 (1947), the Petitioner could not raise claims totally separate from those raised by the respondent in the Appeals Court when no cross-appeal had been filed. Finally, *Morley Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-192 (1937), involved the appropriateness of challenging the scope of an equitable decree in absence of a cross-appeal.

Unlike those cases, this case *does not* involve the adverse resolution of an independent claim against the Petitioner from which no cross-appeal was taken. Thus when the Court of Appeals reversed on the theory of express contract, it should also have remanded the case to the District Court on the theory of implied contract. Indeed, both *Conley v. Gibson*, 355 U.S. 41 (1957) and *Maty v. Graselli Chemical Co.*, 303 U.S. 197 (1938) — cases emphasizing the importance of allowing liberality in the drafting of pleadings—suggest that this case should be

remanded for findings of fact and conclusions of law on the theory of implied contract. Additionally, the policy underlying the provisions of Federal Rule 8(e)(2), which specifically permits alternative pleading, counsels this result. See Wright and Miller, Federal Practice and Procedure; Civil §§ 1282, 1283.

In summary, Berger has been deprived of a decision on a claim that was dismissed, after hearing, only because the District Court granted full relief on an alternative count. (R. 1689-1705). There was absolutely no reason for Petitioner to take a cross-appeal. Basic fairness requires that the decision of the lower court be modified to require at the very least a remand to the District Court for findings of fact and conclusions of law on the issue of implied contract which, although fully tried, was not ripe for decision, until reversal of Plaintiff's Judgment by the Court of Appeals.

Respectfully submitted,

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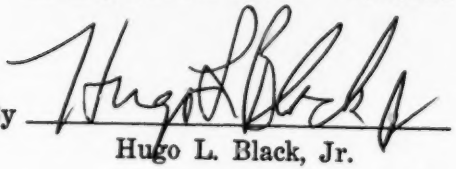
By 
Hugo L. Black, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply To Brief of Respondent in Opposition were furnished on the 7th day of September, 1972, to the following:

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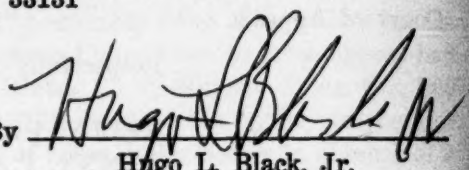
By 
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